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No. 86-1921 (3)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

LIFETIME DOORS, INC.,
Petitioner,

v.

BARBER & ROSS CO.,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent Barber & Ross Co. ("B & R") does not and cannot challenge Petitioner's summary of the law on tying. B & R nowhere disputes that a proper rule of reason tying analysis requires a court to find that a defendant had market power in the tying product market and that the tied sales resulted in anticompetitive effects in the tied product market. Manifestly, the Fourth Circuit found a tying violation below without meeting these long-settled analytical requirements, and did so in an opinion so broad as to establish a new Rule on tying which is at variance with the reasoning of this Court in *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984).

Since B & R has no substantive defense, it attempts to downplay the dangerous new precedent of *Lifetime Doors, Inc. v. Barber & Ross Co.,* 810 F.2d 1276 (4th Cir. 1987) by (a) adding language to the Fourth Circuit opinion which brings it into conformity with proper tying analysis; and (b) arguing that the opinion can be dismissed as *sui generis.* Neither of the two contradictory positions is valid. The holding in *Lifetime Doors* is very broadly worded and there is nothing in the opinion to prevent the Rule it creates from being applied freely in the future. The opinion below diverges widely from established precedent and must be reviewed in order to restore harmony among the circuit courts' treatment of tying violations.

Petitioner Lifetime Doors, Inc. ("Lifetime") responds to B & R's chief arguments as follows:

I.

RESPONDENT FAILED TO LIMIT THE PRECEDENTIAL EFFECT OF THE OPINION BELOW

B & R castigates Lifetime for warning that a new Rule on tying was created by the Fourth Circuit in *Lifetime Doors*. B & R wishes this Court to believe that the precedent can be confined to the narrow facts of the case. The very nature of the Fourth Circuit's perfunctory and illogical opinion dooms such optimism. B & R produced a narrow "general proposition" from that opinion only after reading into it numerous limiting facts and legal connotations which the Fourth Circuit totally left out.

A side-by-side reading of B & R's "general proposition" derived from the opinion and the opinion itself shows how unconstrained the Fourth Circuit Rule really is:

B & R's Proposition	Fourth Circuit Opinion	The Fourth Circuit Rule
1. When two products are sold together (Tied Sale)	Tied Sale	Tied Sale
2. By the dominant firm in the market	No discussion of dominance; introductory section of opinion (p. 3) mentions that Lifetime is a "large" manufacturer of doors, but even a "large" manufacturer can be a "small" (weak) competitor.	By a "large" company
3. Intentionally	No discussion of anticompetitive intent, as opposed to robust competitive intent — a notoriously difficult distinction in situations of unilateral action. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05 (1985); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).	———

4. Uses its control of the tying product [restatement of #2, *supra*]	*See* #2, *supra*. No discussion of why Lifetime's control over panel doors was any greater than any other manufacturer's control over its own product.	Of two of its products
5. To force	No search for objective proofs of forcing (*e.g.*, the price of the package exceeds the sum of the competitive prices for each item purchased separately).	Allegation of force
6. Its customers to purchase the tied product	Court accepts B & R's testimony that it was "forced" (pp. 5, 6, 8), references other customers (p. 5), but gives no specifics as to how many were forced, how, or when.	By one customer
7. Thereby succeeds in foreclosing significantly . . . its competitors	No discussion of foreclosure	———
8. And even succeeds in deterring entry	No such holding	———
9. And cannot articulate a pro-competitive rationale	Some general reference to anticompetitive intent, as in #3, *supra*, but no discussion of why, when, or if intent is relevant. *Cf. Cascade Cabinet Co. v. Western Cabinet & Millwork*, 710 F.2d 1366, 1373 (9th Cir. 1983) ("the fact that no competitive benefits are advanced in favor of a restraint . . . does not automatically constitute it unreasonable under the Sherman Act.")	Without procompetitive articulation

Results In
Sherman Act Violation

When B & R's restatement of the Fourth Circuit holding is pruned to an accurate level, it agrees with Lifetime's summary of the holding. There is indeed a Fourth Circuit Rule on tying, and it is: a firm which offers two products for sale together must be prepared to justify its distribution policy lest it be successfully sued for tying by a single customer which claims it was forced to buy the package — even though there has been no proof that the seller could or did disrupt competition in any relevant market. In other words, tied sales by all but the "smallest" seller are presumptively illegal.

This precedent jeopardizes virtually every tandem sale. It will chill robust and innovative competition.

B & R states that Lifetime has not shown a conflict in the circuits. It is quite clear, however, that two distinct and conflicting analytical approaches to tying have emerged among the circuits. The first, embraced by the First, Third, Seventh and Eleventh Circuits, follows the reasoning in *Jefferson Parish* requiring proof of substantial market power as a threshold element in a tying violation. 466 U.S. 2, 12-14. *Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622, 623 (1st Cir. 1984); *Ungar v. Dunkin' Donuts Of America, Inc.*, 531 F.2d 1211, 1224 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 670-73 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1659 (1986); *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407, 1414 (11th Cir. 1987); *Spartan Grain and Mill Co. v. Ayers*, 735 F.2d 1284, 1288 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985). Failure to establish market power is a "fatal weakness" which renders every other element of the antitrust case irrelevant. *Will*, 776 F.2d at 671.

In troubling contrast, the Ninth Circuit, now joined by the Fourth in this matter, obviously considers market power to be a subsidiary, if not insignificant, element of tying analysis. *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985) holds that a tying plaintiff may prevail without establishing defendant's power over price in the

relevant market, merely by showing that defendant's competitors cannot provide the *identical* package of goods. Circular and sterile as this reasoning may be, it at least acknowledges that market power is an issue which must be addressed, however fleetingly, while deciding a tying case. Going even further, however, the Fourth Circuit in this matter has dispensed altogether with the market power question. Together these two cases, but particularly *Lifetime Doors,* evidence a disturbing trend away from the ordered, economically sound analysis of tying practices set forth in *Jefferson Parish* and followed by most jurisdictions.

II.

THE FOURTH CIRCUIT FAILED TO CONSIDER MARKET POWER IN THE TYING PRODUCT AS AN ELEMENT IN A TYING VIOLATION

B & R barely challenges Lifetime's contention that the Fourth Circuit erred in not reviewing the record for evidence of Lifetime's market power in the tying product (panel doors). B & R attempts to sidestep the whole issue by claiming that this argument was not raised below in the context of a rule of reason discussion. However, B & R contradicts its own argument by conceding that market power was litigated "during every stage of this litigation." R. Br. at 7.

Lifetime's briefs on appeal to the Fourth Circuit contain thorough discussions of market power as a threshold element of a tying violation. B & R asks this Court to disregard those arguments because a portion were made in context of *per se* analysis. However, as this Court has noted "there is often no bright line separating *per se* from Rule of Reason analysis." *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma,* 468 U.S. 85, 104, n. 26 (1984). As a comparison of the majority opinion and concurrence in *Jefferson Parish* shows, the *per se* and rule of reason analyses share the following key elements of a tying violation: existence of separate products, market power in the tying product[1] and a substantial foreclosure effect in the tied market. It is a fundamental truth of antitrust law that market power is the *sine qua non* of every rule of reason case. *See, e.g., Polk Brothers, Inc. v. Forest City Enterprises, Inc.,* 776 F.2d 185, 191 (7th Cir. 1985) (collecting cases); *Graphic Products Distributors, Inc. v. Itek Corp.,* 717 F.2d 1560, 1568-72 (11th Cir. 1983) (collecting authorities); Easterbrook, *The Limits of*

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[1] "*Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a '*per se*' rule against tying arrangements, it has also recognized that tying may have pro-competitive justifications that make it inappropriate to condemn without considerable market analysis. *See Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. at 11-12." *National Collegiate Athletic Association,* 468 U.S. at 104, n. 26.

Antitrust, 63 Tex. L. Rev. 1, 20 (1984). Where a case was argued on alternative rule of reason and *per se* grounds, it would be a paradox indeed for a court to confine market power arguments to the *per se* context alone.[2] B & R would have near identical market power testimony and argument made twice: once for a *per se* analysis and once again under the rule of reason. Requiring such a duplicative waste of a court's time elevates semantic labels over legal and economic content.

Respondent's attempt to analogize to *Federal Trade Commission v. Indiana Federation of Dentists*, ____ U.S. ____, 106 S.Ct. 2009 (1986) *("IFD")* is equally strained. *IFD* concerned a conspiracy among competitors to withhold services which customers demanded. Such horizontal "naked" restraints on competition are traditionally far more suspect than unilateral conduct or vertical restraints, and far more easily seen to impair market performance. 106 S.Ct. at 2018, 2019. As Judge Bork has put it, "the fact of agreement defines the market." R. Bork, *The Antitrust Paradox*, 269 (1984). Even in *IFD*, this Court confined approval of truncated market analysis to situations where "actual, sustained adverse effects on competition" are obvious. 106 S.Ct. at 2019. As discussed in our Petition for Certiorari, our case does not present an obvious picture of detrimental competitive effects. Accordingly market power analysis cannot be omitted.

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[2]The simple difference between the two approaches is that a *per se* analysis will lead to a conclusive presumption of illegality once all threshold factors are present, whereas a rule of reason analysis continues beyond the threshold factors to weigh actual benefits and costs of the challenged conduct in its proper competitive context. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 290 (1985); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-51 (1977); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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